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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 409

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, BROOKS TRANSPORTATION CO., INC., EAST COAST FREIGHT LINES, INC., AND BRISTOW LINES, INCORPORATED,
Appellants,

VS.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PETITION FOR REHEARING

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I. INTRODUCTION

Pursuant to Rule 33, as amended, of the revised Rules of the Supreme Court of the United States, Appellants, the Baltimore Transfer Company, Davidson Transfer and Storage Company, Cochrane Transportation Company, Brooks Transportation Co., Inc., East Coast Freight Lines, Inc. and Bristow Lines, Incorporated petition the Court for a rehearing of the above entitled case.

II. STATEMENT

The appeal in this case is from a judgment of the United States District Court of the District of Maryland dismissing Appellants' complaint seeking to set aside an Order of the Interstate Commerce Commission. A joint motion to affirm was filed on behalf of the United States and the Interstate Commerce Commission, and on October 19, 1953, a brief of Appellants, in opposition to this joint motion to affirm, was filed. On November 30, 1953, this Court granted the joint motion and affirmed the judgment of the United States District Court for the District of Maryland.

III. GROUNDS FOR PETITION

The District Court Committed Errors Requiring Reversal Of Its Judgment.

Appellants' appeal from the judgment of the United States District Court is under those statutory provisions providing for a direct appeal to this Court in cases involving the validity of Orders of the Interstate Commerce Commission. Appeal in this manner is the exclusive remedy available to Appellants to secure relief from an Order of the Interstate Commerce Commission which they unqualifiedly allege is invalid, and from a judgment of the United States District Court which erroneously upholds this invalid Order. Appellants respectfully and vigorously urge that, irrespective of any other considerations, on a direct appeal of this character, it is mandatory upon this Court to grant a rehearing on this appeal if the District Court has committed such error as would require reversal under ordinary Appellate procedure. Any other treatment of this appeal would deny Appellants due process of law in that they are prohibited by statute from pursuing ordinary Appellate procedure, that is appeal to the Circuit

Court of Appeals. Appellants allege that the District Court has, in fact, committed errors in this case which clearly require a reversal of its judgment and that, therefore, a rehearing and reconsideration of this appeal by this Court is warranted and necessary.

Section 10 (e) of the Administrative Procedure Act provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (1) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law * * * (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 * * *."

Section 8 (b) of the Administrative Procedure Act provides "all decisions * * * shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons and basis therefor upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Appellants contend that in this case, the Commission failed to include a statement in its Report of "findings and conclusions, as well as the reasons or basis therefor," upon a "material issue of fact, law, or discretion presented on the record" as this agency was required to do by Section 8 (b).

The District Court erroneously failed to hold unlawful and set aside the decision of the Interstate Commerce Commission complained of, such decision being in direct violation of the provisions of Section 8 (b) as that section is cited hereinabove.

The District Court Erroneously Determined That The Interstate Commerce Commission Had Made Findings And Conclusions On The Material Issue Of The Dormancy Of The Neale Rights.

In the hearing of this case before the District Court Appellants alleged that the Interstate Commerce Commission had failed to make findings and conclusions upon the material issue of the dormancy of the Neale rights between Baltimore, Maryland and Washington, D. C. The entire transaction which was before the Interstate Commerce Commission for its consideration was conditioned upon the approval of these rights. The District Court and this Court have no proper concern with what the ultimate Commission decision might have been had it made the required finding. The only question for consideration is whether or not the Commission has made a finding on the issue which can be supported by substantial and relevant evidence contained in the record.

In answer to this allegation, the District Court stated:

> "Other points stressed by the Plaintiffs are that the Commission failed to make any finding or conclusion with respect to the alleged dormancy of the Neale rights between Baltimore and Washington * * * However, the Commission did make findings and conclusions on both of these points * * *"
>
> (The other point referred to by the District Court is not pertinent to this appeal.)

As findings and conclusions on this issue, the District Court cited the following excerpt from the Report of the Interstate Commerce Commission:

> "Traffic was interlined at Baltimore with vendee (Quinn) and other carriers. Vendee commenced interchanging with the administratrix in March of 1950,

several months after executing the agreement to purchase the rights. According to an exhibit filed after the hearing, they interlined at Baltimore 416 shipments during the first six months of 1951, of which 366 consisted of paper moving from Lawrence, Mass., to Washington, 49 of skids from Washington to Lawrence, and 1 of oysters from Kilmarnock, Va., to Boston. Of the total shipments, 381 were transported from the point of origin to the point of destination in vendee's vehicles operated by its drivers. As to the remaining 35 shipments, the association's counsel, who examined the underlying data, assumes that the payments made by vendee to the administratrix were 'for the use of the Neale rights,' and not for actual transportation by the latter. It is clear that there was no genuine interchange in respect of the 381 shipments and that the arrangements between applicants were not consonant with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 M. C. C. 675. Moreover, such arrangements were initiated after the agreement to purchase. *The fact remains, however, that operations have at all times been actively and consistently conducted under Neale's certificate without regard to the above arrangements with vendee.*" (Emphasis supplied by District Court.)

Appellants state categorically that the Commission *did not* make findings and conclusions on this material issue. The excerpt of the Report of the Interstate Commerce Commission construed by the District Court to constitute such findings and conclusions has absolutely no reference to the issue of dormancy raised by Appellants. This excerpt refers exclusively to an interchange arrangement between Neale and Quinn, which arrangement was held to be invalid by the Commission, and to operations by Neale between points *other than Baltimore, Md. and Washington, D. C.* The *only* evidence of record relating to the question of whether or not Neale had conducted operations between Baltimore, Md. and Washington, D. C. was a stipulation

entered into by Counsel for Quinn Freight Lines and for Appellants that *Neale had never conducted operations between Baltimore, Md. and Washington, D. C.* except those attempted under the interchange arrangement with Quinn, held to be invalid by the Commission, which were illegal operations of Quinn and not those of Neale. The District Court completely ignored this stipulation although this portion of the record was repeatedly cited by Appellants for its consideration in accordance with Section 10 (e) of the Administrative Procedure Act.

Appellants repeat that no findings and conclusions on this issue were made by the Commission and the District Court's determination to the contrary constitutes prejudicial and reversible error for the correction of which appeal to this Court is the exclusive remedy available to Appellants. A correct determination by the District Court, namely, that the Commission did not make findings and conclusions on this issue would have required a remand of the case to the Commission to make appropriate findings and conclusions. Had this been done, the rights of Appellants would have been protected, but because of this error, irreparable damage has resulted to them.

Section 8 (b) of the Administrative Procedure Act required the Commission to make the requested findings and conclusions. The issue raised by Appellants was a material issue and was recognized as such by the District Court, in it's Opinion and by the United States of America and the Interstate Commerce Commission in their joint Motion to Affirm.[1] The Commission's failure to make the requested

[1] On page 2 of the joint Motion to Affirm, there appears the following language as a footnote:

"There is no merit to appellants' contention that the Commission failed to make findings on the 'basic and material' issues of (1) the

findings and conclusions and the District Court's upholding of this failure constitutes reversible error.

The District Court's Rule Of Judicial Review Is In Conflict With The Rule Adopted By Other District Courts And By This Court.

The District Court, in its Opinion, makes the following statement:

> "The Administrative Procedure Act (5 U. S. C. A. Secs. 1001 et seq.) has not altered the rule of administrative finality."
>
> Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474.

Appellants have already stressed the erroneous construction placed by the District Court upon this Court's decision in *Universal Camera Corporation v. National Labor Relations Board*. This decision clearly establishes a vastly different rule of judicial review than that adopted by the District Court.

Since the filing of their brief in opposition to the joint Motion to Affirm, a Three Judge Statutory Court decision has been reported in *Coyle Lines, Incorporated, et al v. United States of America, et al* (U. S. District Court, Eastern District of Louisiana, New Orleans Division), 115 F.

'dormancy' of Neale's rights between Baltimore and Washington (assignments of error 18-28), and (2) the alleged invalidity of Quinn's interchange with Neale (assignments of error 30-34). As the district court noted, the Commission expressly found that Neale had made a large number of interchange shipments between Baltimore and Washington — Virginia in 1950 and 1951, and that, despite the interchange agreement, *these operations* at all times had been 'actively and consistently conducted under Neale's certificate'." (Emphasis Supplied.) (As heretofore noted, the interchange arrangement referred to was held to be invalid and no Baltimore-Washington operations were ever conducted by Neale except those attempted under this invalid interchange arrangement.)

Supp. 272. This case involved the validity of an Order of the Interstate Commerce Commission, granting a certificate of public convenience and necessity to a common carrier by water. In this decision, the District Court stated:

> "Before undertaking a consideration of these questions, reference should first be had to the scope of the judicial review of orders of the Interstate Commerce Commission. It seems clear that the scope of the *judicial review of administrative proceedings may have been broadened to some extent by the Administrative Procedure Act.* (Emphasis Supplied.) Whereas formerly an administrative order was valid if supported by substantial evidence, now the touchstone of validity is 'substantial evidence on the record considered as a whole'."

A comparison of the interpretations placed upon the *Universal Camera Case* and the provisions of the Administrative Procedure Act by the District Court of Maryland and the District Court of Louisiana makes it obvious that these two courts are in direct conflict. At an irreducible minimum, the *Universal Camera Case* and the Administrative Procedure Act require a reviewing court to consider the *entire* evidence of record, including the evidence opposed to the Commission's action.

The District Court in the instant case gave absolutely no consideration to the *only* evidence of record bearing on the issue, that Neale had never conducted any operations between Baltimore and Washington except those attempted under the invalid interchange arrangement with Quinn, which were illegal operations of Quinn and not of Neale. This evidence was opposed to the validity of the Interstate Commerce Commission's action and consideration thereof was crucial to a proper determination of the issues raised. The Court's failure to consider it was contrary to the pro-

visions of the Administrative Procedure Act and the requirements laid down by this Court in the *Universal Camera Case* and constitutes reversible error.

The District Court's Determination That Findings Adequate To Support A Conclusion Of Consistency With The Public Interest Had Been Made By The Commission Is In Error.

The statutory provisions applicable to the proceeding in question require the Commission to find that the proposed transaction will be "consistent with the public interest" before the transaction can legally be approved. The "public" referred to in these statutory provisions obviously means that segment of the public which might conceivably have some interest in the result of the particular proceeding before the Commission. In this case, it is clear, for example, that the "public" does not include a shipper who might desire transportation service between Chicago, Illinois and Milwaukee, Wisconsin. The "public" contemplated are those who, on the basis of the record before the Commission, might conceivably have some need for Quinn's services if the transaction were approved.

The entire basis for the District Court's determination that the Interstate Commerce Commission made adequate findings to support an ultimate conclusion that approval of the proposed transaction would be consistent with the public interest consists of a determination that such approval would permit Quinn to eliminate the necessity of interchange arrangements in transporting freight *from Massachusetts points to points south of Baltimore, Md. and Washington, D. C. The entire evidence of record relates exclusively to such an operation.*

However, the approval granted by the Commission in this case will permit Quinn to perform operations not even

remotely connected with the "public" interested in this transaction as to which "public" exclusively the statutory test of "consistency with the public interest" is required by law to be applied. There is not a scintilla of evidence in the entire record to support a conclusion that it would be consistent with the interest of that segment of the "public" desiring transportation service between points such as Baltimore, Md. and Washington, D. C.; Baltimore, Md. and Richmond, Va.; New York, N. Y. and Richmond, Va. and Philadelphia, Pa. and Richmond, Va. to permit Quinn to perform such operations. The Commission, itself, found that the services conducted by Appellants between these specified points were adequate and more than sufficient to serve the "public" desiring transportation service between these points.

From consideration of the practical facts of transportation problems, such as outlined above, the Interstate Commerce Commission has developed principles of law requiring the elimination of dormant portions of certificates proposed to be transferred. Obviously, it cannot be consistent with the public interest to permit the transfer of a certificate, or portion thereof, which has been dormant for a long period of time unless it can be shown by members of the "public" desiring to use such dormant service that they, in fact, need it. The operations of Neale herein complained of have, in fact, been dormant. There has been absolutely no showing by any member of the "public" desiring transportation service between Baltimore, Md. and Washington, D. C., or between any of the other cities referred to above, to warrant a conclusion that the institution of the service proposed by Quinn would be "consistent" with their interests.

The very essence of Appellants' contention in this case rests in a proper consideration of the above. Had the District Court given proper consideration to these contentions, it would have reached a conclusion different from that set forth in its Opinion. Its failure to do so clearly constitutes reversible error.

WHEREFORE, Appellants respectfully pray that this Honorable Court rehear and reconsider its judgment in this case and for the reasons set forth herein and in their brief in opposition to the joint Motion to Affirm, deny the said Motion and, on hearing, reverse the judgment of the United States District Court for the District of Maryland.

Respectfully submitted,

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AFFIDAVIT

I hereby certify that on this 14th day of December, 1953, before me, a Notary Public in and for the City of Baltimore, State of Maryland, personally appeared James J. Doherty, Counsel for Appellants, and made oath in due form of law that the within Petition for Rehearing filed on behalf of Appellants is presented in good faith and not for delay.

BARBARA MATTER,
Notary Public.

My Commission Expires May 2, 1955.

(Seal)